In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-199

HAROLD E. L. BARTON, PETITIONER

v.

ROGERS C. B. MORTON, SECRETARY OF THE DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The only question properly presented by the petition is whether the factual determination by the Secretary of the Interior that petitioner had not discovered valuable minerals as of the date of his application for a patent of public lands was supported by substantial evidence.

1. Petitioner and another applied to the Department of the Interior for patents to two lode mining claims. The Secretary of the Interior held the claims void for lack of discovery of valuable mineral deposits and petitioner brought this suit to obtain judicial review of the Secretary's determination. The district court entered summary judgment in favor of the Secretary and dismissed the action (Pet. App. A38-A40). The court of appeals, in a thorough opinion on which we rely, affirmed (Pet. App. A41-A47).

The evidence showed that Barton had exposed veins on both claims, containing some gold and silver and base metals, but no exploitable deposits. Experts testified that the exposed veins justified tunneling in search of chutes or pockets, and petitioner argued that, because a prudent man would undertake further work, he had discovered valuable minerals justifying a patent. The Secretary contended that, as petitioner had not yet discovered a mineral deposit but was only searching for one, he had not made the discovery required by the Mining Law (30 U.S.C. 22, *et seq.*; Pet. App. A41-A43).

The court of appeals held that petitioner's findings of samples in a vein did not support his claim of discovery of a valuable deposit entitling him to a patent. The court noted that no difference exists between a showing of isolated mineral values not occurring in a vein, which only suggests the existence of a valuable mineral deposit within the limits of the claims, and the showing of isolated values occurring in a vein. In either case what is called for is further exploration, which does not support a demand for a patent of public lands (Pet. App. A45). The court explained why the prudence of exploring further does not justify a patent (Pet. App. A46): "A patent passes ownership of public lands into private hands. So irrevocable a diminution of the public domain should be attended by substantial assurance that there will be a compensating public gain in the form of an increased supply of available mineral resources. The requirement that actual discovery of a valuable mineral deposit be demonstrated gives weight to this consideration."

In conclusion, the court noted (Pet. App. A47) that denial of a patent did not bar petitioner from continuing the search for a valuable mineral deposit and

later receiving a patent; it only withholds passage of title until that discovery is made.

2. The decision of the court of appeals is correct, and is supported by a long history of consistent administrative and judicial construction of the relevant statutes. It does not conflict either with decisions of other circuits, or with any decision of this Court.

To establish a "discovery" entitling him to a patent, a mineral lode claimant is required to expose physically, within the limits of his claim, a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes. Speculation, hope, and the like have been held insufficient time and time again.[1]

The court of appeals concluded that, while petitioner "ha[d] found ore *samples* with indicated values exceeding $70 per ton, the record does not support a finding that they have found a *deposit* yielding ore of that quality, or of any other quality, the exploitation of which may be contemplated" (Pet. App. A33; emphasis in original). Contrary to petitioner's assertions (Pet. 7), as we have shown, neither the Secretary nor the courts require a claimant to provide "demonstration evidence by exploitation of the deposit" before a patent will issue, but he must have found, not merely suspect that he may find, an exploitable deposit.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

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[1] *United States* v. *Coleman*, 390 U.S. 599, 602; *Cole* v. *Ralph*, 252 U.S. 286, 299; *Cameron* v. *United States*, 252 U.S. 450, 459; *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335-336; *Chrisman* v. *Miller*, 197 U.S. 313, 322; *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673, 683; *Converse* v. *Udall*, 399 F. 2d 616, 620-621 (C.A. 9), certiorari denied, 393 U.S. 1025; *Henault Mining Co.* v. *Tysk*, 419 F. 2d 766, 768-769 (C.A. 9), certiorari denied, 398 U.S. 950; *Udall* v. *Snyder*, 405 F. 2d 1179, 1180 (C.A. 10), certiorari denied, 396 U.S. 819.